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No. 05-11284

In the Supreme Court of the United States

JALIL ABDUL-KABIR,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONS DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF DERYL MADISON, RONALD CHAMBERS, BILLY COBLE, FERNANDO GARCIA, CHARLES MINES, BILLY NELSON, JONATHAN REED, STEVEN RODRIGUEZ, AND ROY SMITH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CHRISTOPHER J. RICHART
Mayer, Brown, Rowe & Maw LLP
700 Louisiana St., Ste. 3600
Houston, TX 77002
(713) 238-3000

DAVID R. DOW
Counsel of Record
University of Houston Law Center
100 Law Center
Houston, Texas 77204
713-743-2171 (voice)
713-743-2131 (facsimile)

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are inmates currently incarcerated on Texas's death row.[2] *Amici curiae* were sentenced under the pre-1991 Texas death penalty statute and have habeas petitions pending in federal court that challenge the constitutionality of their death sentences based on the Court's decisions in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), *Penry* v. *Johnson*, 532 U.S. 782 (2001) ("*Penry II*"), *Tennard* v. *Dretke*, 542 U.S. 274 (2004), and *Smith* v. *Texas*, 543 U.S. 37 (2004) (per curiam). Contrary to the decisions of this Court, the Fifth Circuit has once again adopted a reading of *Penry I* that does violence to this Court's rulings and has and will result in an unconstitutional resolution of *Penry* claims. The correct application of the Court's death penalty jurisprudence is literally a matter of life and death for *amici curiae*.

SUMMARY OF ARGUMENT

For more than a decade, the Fifth Circuit applied its "constitutional relevance" test to deny relief to almost every federal habeas petitioner asserting a *Penry* claim. See *Robertson* v. *Cockrell*, 325 F.3d 243, 256 (5th Cir. 2003). In no uncertain terms, this Court rejected the constitutional relevance test, finding that it "has no basis in our

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[1] No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] Deryl Madison, Ronald Chambers, Billy Coble, Fernando Garcia, Charles Mines, Billy Nelson, Jonathan Reed, Steven Rodriguez, and Roy Smith.

precedents." *Tennard*, 542 U.S. at 287. The Court's decisions in *Tennard* and *Smith* simply reaffirm the Court's consistent holding that "full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime.'" *Penry I*, 492 U.S. at 328 (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (plurality opinion)). Despite this Court's command that the punishment phase jury in a capital murder case must be permitted "to give '*full* consideration and *full* effect to mitigating circumstances' in choosing the defendant's appropriate sentence," *Smith*, 543 U.S. at 38 (quoting *Penry II*, 532 U.S. at 797), the Fifth Circuit has continued to apply an unconstitutionally narrow reading of *Penry I* and its progeny. While different panels of the court have created confusion by relying on varying bases for rejecting *Penry* claims, the consistency lies in the essential refusal to implement the decisions of this Court. For these reasons, the Court should grant review in these cases.

ARGUMENT

I. This Court's *Penry* Jurisprudence Requires the Punishment Phase Jury to Have a Meaningful Vehicle to Consider and Give Effect to All of a Defendant's Mitigating Evidence.

In *Penry I*, the Court sustained an as-applied challenge to the pre-1991 Texas death penalty statute brought by a defendant who presented evidence that he was mentally retarded, had been abused as a child, and consequently had "poor impulse control and an inability to learn from experience." *Penry I*, 492 U.S. at 308. The Court held that in cases where "the jury [is] unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues," *id.* at 321, even if such evidence has some relevance to the special issues, see *id.* at 322, a separate issue allowing the jury to give mitigating effect to all of the

defendant's evidence in determining punishment must be submitted. *Id.* at 328.

In the years after *Penry I* was decided, the Fifth Circuit honored the decision more in the breach than in the observance. Although this Court reviewed and redressed the tests that developed in the lower courts in the wake of *Penry I*, a brief review is necessary here to set the framework for the discussion revealing the similarities in the appellate court's pre- and post-*Tennard* jurisprudence.

The primary method used to reject *Penry* claims was the "constitutional relevance" test. Under this "screening test," *Tennard*, 542 U.S. at 283, a federal habeas petitioner asserting a *Penry* claim was required to show that he suffered from a uniquely severe permanent handicap through no fault of his own and that there was a nexus between this handicap and his crime. *Tennard* v. *Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002), *rev'd sub nom. Tennard* v. *Dretke*, 542 U.S. 274 (2004).[3]

Few petitioners were able to meet the erroneous standard the Fifth Circuit applied to *Penry* claims. See *Robertson*, 325 F.3d at 256 (noting that between 1992 and 2002, of the forty-seven death penalty cases in which the defendant asserted a *Penry* claim, the Fifth Circuit rejected *Penry* claims forty-six times).[4] Of the forty-six petitioners

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[3] Aggravating the damage done by the federal court, the Texas Court of Criminal Appeals followed the Fifth Circuit's lead, weighing the mitigating evidence presented by a habeas petitioner to determine whether he had presented evidence of abuse and mental impairment as severe as that suffered by Penry. See *Ex parte Smith*, 132 S.W.3d 407, 413-14 (Tex. Crim. App.) (following the Fifth Circuit's two-part "uniquely severe" and "nexus" test), *rev'd*, 543 U.S. 37 (2004); see also *Tennard*, 542 U.S. at 279 (discussing the analysis used by the Texas Court of Criminal Appeals in reviewing Tennard's state habeas petition).

[4] See also *Ex parte Tennard*, 960 S.W.2d 57, 64 (Tex. Crim. App. 1997) (en banc) (Meyers, J., concurring) (noting that "[i]n cases too numerous to mention, this Court has rejected" *Penry* claims premised on

identified in *Robertson*, 39 have been executed. See Texas Department of Criminal Justice, *Executed Offenders*, *at* http://www.tdcj.state.tx.us/stat/executedoffenders.htm (last visited July 15, 2006).

Tennard was one such case. The only evidence Tennard presented at the punishment phase of his trial was testimony from his parole officer that Tennard had a 67 IQ. *Tennard*, 542 U.S. at 277. During punishment phase closing arguments, defense counsel's primary argument was that Tennard's low intelligence and gullibility mitigated his culpability. *Id.* at 277-78. The Fifth Circuit rejected Tennard's *Penry* claim on the grounds that Tennard had failed to establish a nexus between his low intelligence and his crime and his mitigating evidence was not sufficiently similar to Penry's. *Tennard*, 284 F.3d at 597; see also *Ex parte Tennard*, 960 S.W.2d 57, 62-63 (Tex. Crim. App. 1997) (en banc).

This Court soundly rejected the restrictive screening test employed by the Fifth Circuit and held that the two statutory special issues that were submitted to Tennard's jury did not give the jury an adequate vehicle to consider and give effect to Tennard's evidence of low intelligence. *Tennard*, 542 U.S. at 287-88. This Court concluded that "the Fifth Circuit's screening test has no basis in our precedents and, indeed, is inconsistent with the standard we have adopted for relevance in the capital sentencing context," *id.* at 287, and emphatically rejected both the "uniquely severe permanent handicap" and "nexus" elements of the Fifth Circuit test. *Id.* at 289.

The Court reaffirmed that decision in *Smith*, which came to the Court after the Texas Court of Criminal Appeals ("TCCA") denied state post-conviction relief. Smith presented mitigating evidence of organic learning disabilities,

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"alcoholism/drug abuse, troubled background, and certain types of mental illness" including schizophrenia and manic depression).

speech handicaps, a 78 IQ, placement in special education classes, and his father's drug addiction, involvement in gang violence, and theft of money from other family members. *Smith*, 543 U.S. at 41. The Court noted that Smith's mitigating evidence was relevant to the appropriateness of the death penalty regardless of the severity of his mental health problems. *Id.* at 44. The Court also held that by requiring Smith to demonstrate both a severe disability and a nexus between his mitigating evidence and his crime, the TCCA had "relied on a test we never countenanced and now have unequivocally rejected." *Id.* at 45 (emphasis omitted).

Tennard and *Smith* underscore the decision made fifteen years earlier in *Penry I*. Under the standard set forth in *Penry I*, a court addressing a claim that the jury was unable to give effect to a defendant's mitigating evidence need only determine whether the jury could have believed that the mitigating evidence "diminished [the defendant's] moral culpability and made imposition of the death penalty unwarranted" but "would be unable to give effect to that conclusion." *Penry I*, 492 U.S. at 323; see also *Tennard*, 542 U.S. at 287-88. An appellate court should not substitute its judgment for that of the jury in weighing the defendant's mitigating evidence to determine whether he has presented proof of childhood abuse or mental health problems severe enough to warrant a sentence less than death. *Tennard*, 542 U.S. at 286. Instead, as long as the defendant's mitigating evidence "might serve 'as a basis for a sentence less than death,'" *id.* at 287 (quoting *Skipper* v. *South Carolina*, 476 U.S. 1, 5 (1986)), and has "mitigating dimension beyond the impact it has" on the statutory special issues, or could only be considered as an aggravating factor under those issues, a habeas petitioner is entitled to *Penry* relief.[5] *Id.* at 288.

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[5] *Amici curiae* are not suggesting that a separate mitigating instruction is required in all cases. *Johnson* v. *Texas*, 509 U.S. 350 (1993), *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988) (plurality opinion), and *Jurek* v. *Texas*, 428 U.S. 262 (1976) (plurality opinion), plainly foreclose such a

II. The Fifth Circuit's Pre-*Tennard* Treatment of *Penry* Claims Limited *Penry I* to Its Facts.

In the post-*Penry I*, pre-*Tennard* era, the Fifth Circuit has consistently rejected, ignored, or misconstrued the mandate of *Penry I*. This has primarily been accomplished through the application of the "constitutional relevance" screening test soundly rejected by this Court in *Tennard*. 542 U.S. at 283 ("This test for 'constitutional relevance,' . . . appears to be applied uniformly in the Fifth Circuit to *Penry* claims."). Through the application of that unconstitutional screening test, the lower court denied relief to Texas death row inmates whose juries may not have been given an appropriate vehicle for the consideration of mitigating evidence that may have served as the basis for a sentence less than death. Attempting to characterize this Court's denials of petitions for a writ of *certiorari* as affirmations of its treatment of *Penry* claims, the Fifth Circuit neatly summarized the effects of the constitutional relevance test in *Robertson*: In the period between the lower court's decision in *Graham* v. *Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), *aff'd*, 506 U.S. 461 (1993) (January 3, 1992) and the end of 2002, of the forty-seven cases addressed on the merits, only one—Michael Blue—was deemed to warrant relief. See *Robertson*, 325 F.3d at 256; *Blue* v. *Cockrell*, 298 F.3d 318 (5th Cir. 2002). In the period between this Court's decision in *Penry I* (June 26, 1989) and January 3, 1992, of the six cases the Fifth Circuit addressed, even peremptorily, on the merits, *Penry* relief was granted in only one, *Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir. 1990).[6] In the year and a half following the

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contention. However, it is equally plain from *Penry I* and its progeny that a separate mitigating evidence instruction *is* required in some cases. The Texas legislature solved the problem in 1991 by requiring the submission of a general mitigating evidence instruction in all cases. See Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (Vernon Supp. 2005).

[6] On remand from this Court, a panel of the Fifth Circuit also granted *Penry* relief in *Graham* v. *Collins*, 896 F.2d 893 (5th Cir. 1990). On rehearing *en banc*, the Fifth Circuit vacated the panel's decision and

Robertson Court's tally, (January 1, 2003 until *Tennard*), five *Penry* claims have been addressed on their merits, with one grant of relief in *Bigby* v. *Dretke*, 402 F.3d 551 (5th Cir. 2005), *cert. denied,* 126 S. Ct. 239 (2005).[7] Thus, of the roughly fifty-eight cases identified by the lower court and undersigned counsel where *Penry* claims were addressed on their merits, relief has been granted in a total of three cases (not counting *Graham*).[8]

While the sheer numbers are themselves notable, when combined with the recognition that the lower court has based their decisions on the uniform application of a screening test that has "no foundation in the decisions of this Court," *Tennard*, 542 U.S. at 283-84, those numbers become increasingly frightening and call for the scrutiny of this Court. Ultimately, the Fifth Circuit's pre-*Tennard Penry* jurisprudence, which refused to apply *Penry I* in any context that varied even slightly from the facts of that case, represents, at best, a significant misunderstanding of the principles on which *Penry I* was based and, at worst, an effort to affirm death sentences without regard to the requirements of the Constitution or the dictates of this Court's precedents. This trend has continued even after this Court's explicit holdings in *Tennard* and *Smith*.

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reinstated the district court's denial of relief. *Graham* v. *Collins*, 950 F.2d 1009 (5th Cir. 1992).

[7] This does not and cannot account for the cases pending in the lower court on requests for a COA or petitions for rehearing or cases pending in this Court on petitions for a writ of *certiorari*.

[8] More recently, *Penry* relief has been denied despite evidence of childhood head injuries, low IQ, and possible retardation, *Smith* v. *Cockrell*, 311 F.3d 661 (5th Cir. 2002), childhood abuse and substance addiction, *Robertson* v. *Cockrell*, 325 F.3d 243 (5th Cir. 2003), and schizophrenia, *Hernandez* v. *Johnson*, 248 F.3d 344 (5th Cir. 2001), to name a few.

III. The Fifth Circuit's Post-*Tennard* Jurisprudence Also Fails to Apply *Penry I* in a Manner Faithful to This Court's Decisions.

In narrowing the categories of evidence—both quantitatively and qualitatively—that qualified as "*Penry*" evidence in the fifteen years following *Penry I*, the Fifth Circuit and the TCCA upheld scores of death sentences using a test that has "no basis" in this Court's jurisprudence. *Tennard*, 542 U.S. at 287. Regardless of whether the Fifth Circuit's refusal to apply *Penry I* was the product of a misreading of this Court's death penalty jurisprudence or a conscious effort to reach a particular outcome regardless of the decisions of this Court, this pattern has continued in the Fifth Circuit's post-*Tennard* decisions.

Since *Tennard* the Fifth Circuit has repeatedly rejected *Penry* claims raised by petitioners with evidence of serious mental health problems and dysfunctional childhood environments by focusing on the possibility that the petitioner might receive treatment, minimizing the extent of the petitioner's mental health problems or dysfunctional upbringing, and relying on its pre-*Tennard Penry* jurisprudence, often without a critical analysis of the effect *Tennard* and *Smith* had on that body of law. See *Coble* v. *Dretke*, 444 F.3d 345 (5th Cir. 2006); *Brewer* v. *Dretke*, 442 F.3d 273 (5th Cir. 2006) (per curiam), *petition for cert. filed*, __ U.S.L.W. __ (U.S. May 30, 2006) (No. 05-11287); *Nelson* v. *Dretke*, 442 F.3d 282 (5th Cir. 2006); *Cole* v. *Dretke*, 418 F.3d 494 (5th Cir. 2005); *Draughon* v. *Dretke*, 427 F.3d 286 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1577 (2006). As with its pre-*Tennard* approach to *Penry* claims, the reasons put forward by the Fifth Circuit to explain its unwillingness to apply *Penry I* to petitioners suffering from mental health problems or raised in dysfunctional childhood environments is without basis in this Court's precedents. See *Tennard*, 542 U.S. at 287.

A second group of post-*Tennard Penry* cases that does not deal with mental health problems or dysfunctional childhood environments also highlights the narrow view the Fifth Circuit has continued to take when considering *Penry* claims. See *Jackson* v. *Dretke*, 450 F.3d 614 (5th Cir. 2006); *Summers* v. *Dretke*, 431 F.3d 861 (5th Cir. 2005), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Apr. 27, 2006) (No. 05-11074); *Bower* v. *Dretke*, No. 03-40980, 2005 U.S. App. LEXIS 16891 (5th Cir. Aug. 11, 2005) (per curiam), *cert. denied*, 126 S. Ct. 1144 (2006). The narrow approach the Fifth Circuit has taken towards these petitioners' *Penry* claims demonstrates a continuing unwillingness to adhere to this Court's understanding of what the Eighth Amendment requires in capital sentencing procedures.

A. The Fifth's Circuit's Post-*Tennard* Approach to *Penry* Claims Based on Mental Health Problems or a Dysfunctional Childhood Upbringing Is Still Without a Basis in this Court's Precedents.

1. The Fifth Circuit Has Improperly Drawn a Distinction Between Treatable and Untreatable Mental Health Problems.

Nothing in this Court's analysis of *Penry* claims supports the "treatable-untreatable" distinction used by the Fifth Circuit to deny relief in the vast majority of cases. As was true in the pre-*Tennard* era, the artificial distinction the Fifth Circuit has drawn between treatable and untreatable mental health problems also ignores the fundamental mitigating thrust of this type of evidence, "'the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Penry I*, 492 U.S. at 319 (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Thus, like the now defunct "constitutional relevance" test, the Fifth Circuit's "untreatability requirement" has no basis in the precedents of

this Court and is contrary to the basic principles underlying this Court's death penalty jurisprudence. See *Tennard*, 542 U.S. at 287-88.

The Fifth Circuit's distinction between treatable and untreatable mental health problems appears to have been derived from Penry's complete inability to learn from his mistakes, which necessarily would have caused the jury to view his evidence of intellectual and emotional impairment solely as aggravating. See *Cole*, 418 F.3d at 506-07 & n.54 (relying on *Penry I* to hold that because "Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes," Cole's evidence of low IQ and an abusive background "fits well within the broad scope of the future dangerousness special issue"). Although the Court identified Penry's inability to learn from his mistakes as one of the reasons the pre-1991 special issues were constitutionally inadequate in his case, *Penry I*, 492 U.S. at 323-24, nothing in *Penry I*, *Tennard*, or *Smith* suggests that a petitioner's inability to learn from experience is a prerequisite for *Penry* relief. To the contrary, although Tennard, like Penry, had low intelligence, there is no suggestion in the Court's opinion that he was unable to learn from his mistakes. See *Tennard*, 542 U.S. at 277-78, 288-89. Similarly, although Smith suffered from learning disabilities and a low IQ, there was no evidence that he was completely unable to learn from his mistakes. See *Smith*, 543 U.S. at 41, 43-45. In addition, although Penry was unable to learn from his mistakes, *Penry I* contains no indication that his antisocial tendencies could not have been controlled or ameliorated by medication or counseling. See *Penry I*, 492 U.S. at 307-10.

In *Johnson* v. *Texas*, 509 U.S. 350, 369 (1993), the Court did draw a distinction between the transient nature Johnson's youth and Penry's inability to learn from his mistakes. However, neither *Tennard* nor *Smith* cited *Johnson* for the proposition that only permanent disabilities warrant *Penry* relief. In addition, youth, although indisputably relevant to

the appropriateness of the death penalty, *id.* at 367, is fundamentally different than other types of mitigating evidence. The purpose of the punishment phase of a capital murder trial is to make an "individualized assessment of the appropriateness of the death penalty" based on the "personal culpability of the criminal defendant." *Penry I*, 492 U.S. at 319. Youth, however, is a universal condition, the opposite of the "diverse frailties of humankind" that may warrant a sentence less then death based on the uniqueness of each individual defendant. See *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). Thus, although Johnson's youth was relevant to the future dangerousness inquiry, see *Johnson*, 509 U.S. at 368, it had no other legitimate mitigating significance.[9] Because of the unusual nature of youth as a mitigating factor, *Johnson* cannot be read as creating a bright line distinction between treatable and untreatable mental illnesses. Thus, neither Penry's inability to learn from his mistakes nor *Johnson*'s discussion of the transient nature of youth provides a convincing rationale for the Fifth Circuit's approach to *Penry* claims premised on mental health problems.

Aside from having no basis in the jurisprudence of this Court, the Fifth Circuit's distinction between treatable and untreatable mental health problems would also have encouraged bizarrely inverted trial behavior. Defendants would have had an incentive to argue that they were *untreatable* psychopaths in hopes of earning a general mitigating evidence instruction. On the other hand, the prosecution would have attempted to present evidence that the defendant's mental health problems were treatable, while still contending that the defendant would pose a threat to others regardless of his prospects for treatment. The Fifth

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[9] A particular juror might have been inclined to impose a sentence less than death because of Johnson's youth solely on the basis of mercy or sympathy, but this is not an appropriate basis to refuse to impose a death sentence. See *Johnson*, 509 U.S. at 371-72.

Circuit's emphasis on treatability would have promoted this counter-intuitive, if not perverse, approach to the presentation of mitigating evidence, and it highlights a significant flaw in the Fifth Circuit's analysis of *Penry* claims premised on a petitioner's mental health problems. Because the Fifth Circuit's requirement that a habeas petitioner demonstrate that his mental health problems are not susceptible to treatment before obtaining *Penry* relief has no foundation in the decisions of this Court, the Court should grant review to remedy the lower court's systemic analytical errors in this entire class of cases.

2. *The Fifth Circuit Has Minimized the Effects of the Petitioners' Mental Health Problems and Dysfunctional Childhood Environments to Deny Relief Even Though Tennard Specifically Rejects Such an Analysis.*

In rejecting the Fifth Circuit's constitutional relevance test, this Court held that "to say that only those features and circumstances [of a defendant's character or crime] that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe') could have such a tendency [to mitigate the defendant's culpability] is incorrect." *Tennard*, 542 U.S. at 287. Nevertheless, the Fifth Circuit has implicitly resurrected a severity test in analyzing *Penry* claims based on mental health problems and a dysfunctional childhood environment.

For example, the Fifth Circuit rejected Coble's *Penry* claim because he failed to present evidence of the same "harsh physical abuse" to which Penry had been subjected. *Coble*, 444 F.3d at 362-63. In *Brewer*, the Fifth Circuit denied relief in part because it felt that Brewer's evidence of mental health problems was not "especially strong," even though Brewer had apparently been suicidal and had been voluntarily committed for depression only three months before his crime. *Brewer*, 442 F.3d at 275 n.1. The Fifth Circuit also denied Brewer relief based on his history of

abuse because the abuse to which Brewer was subjected did "not rise to the level of that at issue in *Penry*," even though Brewer's father hit him "'numerous' times" when he was a teenager. *Id.* at 279 n.16. Similarly, in *Nelson* the Fifth Circuit characterized Nelson's evidence that he suffered from borderline personality disorder as "trivial" and "scanty," even though it was supported by expert testimony. *Nelson*, 442 F.3d at 287. It also concluded that Nelson's abandonment by his mother was distinguishable from Penry's evidence of "severe physical abuse."[10] *Id.* at 286. In contrast, in *Bigby* the Fifth Circuit granted *Penry* relief, emphasizing that Bigby's paranoid schizophrenia was "severe, caused him to suffer delusions with respect to the actions and motivations of the people around him, . . . and significantly impacted his interpersonal relationship abilities." *Bigby*, 402 F.3d at 571. The court also noted that Bigby had even "irrationally tried to take the trial court judge hostage in the presence of armed bailiffs." *Ibid.*

The Fifth Circuit's focus on the severity of a petitioner's mental health problems and dysfunctional childhood environment and the quantity of the evidence supporting them, is inconsistent with *Tennard* and *Smith*. The gullibility Tennard demonstrated while committing a previous rape and the single IQ test that supported his claim of low intelligence,

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[10] The Fifth Circuit also denied a *Penry* claim based on "abuse as a child and 'dysfunctional upbringing'" in *Draughon* because it believed Draughon's evidence could be given effect under the future dangerousness special issue. *Draughon* v. *Dretke*, 427 F.3d 286, 298 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1577 (2006). Draughon presented evidence that his step-father "for many years viciously beat his mother and sexually assaulted his sister" and expelled Draughon from the house on several occasions when he was a teenager, forcing him to fend for himself. *Draughon* v. *Texas*, 831 S.W.2d 331, 339 (Tex. Crim. App. 1992) (en banc), *cert. denied*, 126 S. Ct. 1577 (2006). The Fifth Circuit devoted little attention or analysis to Draughon's *Penry* claim, presumably because the court had already determined that he was entitled to a new guilt-innocence trial on an unrelated ineffective assistance of counsel claim. See *Draughon*, 427 F.3d at 297.

Tennard, 542 U.S. at 277-78, could hardly be described as "especially strong." See *Brewer*, 442 F.3d at 275 n.1. Tennard's mitigating evidence, which was not supported by any expert testimony, see *Tennard*, 542 U.S. at 277, was also much weaker than the "scanty" evidence of mental illness at issue in *Nelson*. See *Nelson*, 442 F.3d at 287. Similarly, Smith's IQ, which was between 75 and 78, *Smith*, 543 U.S. at 41, was significantly higher than Penry's IQ of 50-63. *Penry I*, 492 U.S. at 307-08. Nor is there any indication that Smith's learning disabilities, *Smith*, 543 U.S. at 41, were comparable to Penry's mental health problems. See *Penry I*, 492 U.S. at 308. Smith's evidence that his father was a drug addict and a gang member who frequently stole money from other family members, *Smith*, 543 U.S. at 41, was also not nearly as horrifying as Penry's evidence of severe beatings and neglect at an early age. See *Penry I*, 492 U.S. at 308-09.[11]

Nothing in *Penry I*, *Tennard*, or *Smith* suggests that these cases were intended to set forth a minimum level of mental impairment or childhood abuse or neglect a petitioner must demonstrate before obtaining *Penry* relief. To the contrary, *Tennard* explicitly rejected the idea that federal judges should reweigh a petitioner's mitigating evidence to determine whether, in their opinion, it warrants a sentence less than death. See *Tennard*, 542 U.S. at 287. The evidence of serious mental health problems and dysfunctional childhood environments presented by the petitioners in *Coble*, *Brewer*, *Nelson*, *Cole*, and *Draughon* is hardly as trifling as evidence of the number of times a prisoner will shower. See *Tennard*, 542 U.S. at 286 (citing *Skipper*, 476

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[11] Because of the significant difference in the factual records of the respective cases, *Graham* v. *Collins*, 506 U.S. 461 (1993), is not analogous to *Coble*, *Brewer*, *Nelson*, *Cole*, and *Draughon*. For example, although Graham lived with his grandmother off and on when he was a child, he presented no evidence of physical abuse, neglect by his caretaker, or complete abandonment by his mother. See *Graham*, 506 U.S. at 464.

U.S. at 7 n.2). The Fifth Circuit's continued focus on the severity of a petitioner's mental health problems and dysfunctional childhood environment to deny *Penry* relief is inconsistent with *Tennard* and *Smith* and reminiscent of the constitutional relevance test this Court explicitly rejected.

B. The Fifth Circuit has Frequently Relied on Its Pre-*Tennard Penry* Decisions to Deny Relief, Sometimes Without Analyzing the Significant Impact *Tennard* and *Smith* had on That Body of Law.

Since *Tennard*, the Fifth Circuit has continued to rely on its pre-*Tennard* cases to reject *Penry* claims, often without a critical analysis of the effect *Tennard* and *Smith* had on its pre-*Tennard* jurisprudence. This suggests that the Fifth Circuit either remains confused as to the scope of *Penry I* and its progeny or is simply unwilling to implement this Court's mandate.[12]

For example, in *Coble*, the court acknowledged that *Tennard* and *Smith* "significantly altered our circuit's analysis of mitigating evidence offered by a defendant in a capital case." *Coble*, 444 F.3d at 358 n.11. However, the court then relied on two of its pre-*Tennard* cases, *Lucas* v. *Johnson*, 132 F.3d 1069 (5th Cir. 1998), and *Robinson* v. *Johnson*, 151 F.3d 256 (5th Cir. 1998), to hold that Coble was not entitled to *Penry* relief because his mental health problems could be treated. See *Coble*, 444 F.3d at 361-62. The court did not discuss whether *Lucas* and *Robinson* remained good law after *Tennard* and *Smith*. *Ibid.* *Nelson*, in turn, simply relied on *Coble* to reject Nelson's *Penry* claim based on his borderline personality disorder. See *Nelson*, 442 F.3d at 287. The Fifth Circuit also rejected Nelson's

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[12] The Fifth Circuit has granted a COA in two cases raising *Penry* claims specifically to consider the effect *Tennard* and *Smith* had on the court's *Penry* jurisprudence. See *Smith* v. *Dretke*, 422 F.3d 269, 287 (5th Cir. 2005); *Mines* v. *Dretke*, No. 03-11137, 2004 U.S. App. LEXIS 26259, at *30 (5th Cir. Dec. 16, 2004).

claim for relief based on maternal abandonment on the basis of *Graham* and several pre-*Tennard* cases without mentioning *Smith* or the type of dysfunctional childhood environment involved in that case.[13] See *id.* at 286. In *Brewer*, the Fifth Circuit cited *Lucas* and *Hernandez* v. *Johnson*, 248 F.3d 344 (5th Cir. 2001), for the proposition that a treatable mental illness does not require *Penry* relief. *Brewer*, 442 F.3d at 280 & n.18. The *Brewer* court dismissed *Tennard*, reasoning that *Tennard* "overturned only Fifth Circuit methodology for determining what mitigating evidence is constitutionally relevant," *id.* at 280 n.18, without addressing *Tennard*'s conclusion that Tennard's mitigating evidence, like Penry's, had a mitigating dimension beyond the deliberateness and future dangerousness special issues. See *Tennard*, 542 U.S. at 288-89. *Brewer* also failed to discuss, or even mention, *Smith*.

The Fifth Circuit's often cursory and uncritical analysis of the continuing validity of its pre-*Tennard Penry* cases suggests that the lower court continues to be confused about or is unwilling to accept *Penry I*, *Tennard*, and *Smith*. *Tennard* and *Smith* did fundamentally alter the Fifth Circuit's approach to mitigating evidence under the pre-1991 statute, a reality the Fifth Circuit seems unwilling to acknowledge. See *Smith*, 543 U.S. at 45; *Tennard*, 542 U.S. at 287-88.

C. The Fifth Circuit's Most Recent *Penry* Decision Applies a Novel Estoppel Theory to Deny Relief and Departs from the Precedents of Both This Court and the Fifth Circuit Itself.

In *Garcia* v. *Quarterman*, No. 03-11097, slip op. at 12-13 (5th Cir. July 13, 2006), the Fifth Circuit denied relief to a petitioner who asserted a *Penry* claim based on evidence of

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[13] The Fifth Circuit did briefly discuss *Tennard*. It noted that because the Fifth Circuit cases on which it relied did not use the constitutional relevance test to deny the petitioners' *Penry* claims based on childhood neglect or abandonment, those cases remained good law. See *Nelson*, 442 F.3d at 286 n.6.

numerous incidents of sexual abuse that occurred before the age of ten and untreatable psychological defects.[14] *Id.* at 10-11. However, the majority[15] denied Garcia relief because his attorney did not argue in closing that the jury should give "independent mitigating effect" to Garcia's history of sexual abuse and psychological defects beyond the scope of special issues. See *id.* at 15. Essentially, the *Garcia* majority rejected Garcia's *Penry* claim because defense counsel failed to premise his closing argument on a general mitigating evidence instruction the trial court had already refused to submit, *id.* at 27-28 (Benavides, J., dissenting), or the nullification instruction that admittedly would not have cured any constitutional defect in the special issues. *Id.* at 32-33 (Benavides, J., dissenting); see also *id.* at 19 n.13 (acknowledging that the nullification instruction would not have cured any deficiencies in the special issues). The majority's estoppel theory is completely unsupported by precedent. *Id.* at 34 (Benavides, J., dissenting) ("[T]he majority cannot cite a single authority, Supreme Court or otherwise, in support of its estoppel theory . . . .").

In addition, Garcia's psychological defects were "permanent and involuntary," *id.* at 18, and the State offered unrebutted expert testimony that Garcia would probably not respond to treatment. See *id.* at 10-11. Under the Fifth Circuit's own precedent, the untreatability of Garcia's condition would require relief. See *Bigby*, 402 F.3d at 571. Nevertheless, the Fifth Circuit concluded that Garcia's condition could not be viewed as "morally mitigating of guilt." *Garcia*, No. 03-11097, slip op. at 18. Pedophilia understandably inspires horror and loathing, but to the extent it is an involuntary condition that causes a defendant to have

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[14] Both the State and the defense expert diagnosed Garcia as a pedophile. *Garcia* v. *Quarterman*, No. 03-11097, slip op. at 12 (5th Cir. July 13, 2006).

[15] *Garcia* was authored by Chief Judge Jones, the same judge who wrote *Robertson*, which explicitly adopted the constitutional relevance test.

an "uncontrollable compulsion to commit" antisocial acts, see *ibid.*, it is mitigating, even though it does not inspire sympathy.[16] *Garcia* cannot be viewed as anything other than a results oriented decision that contravenes the precedents of both this Court and the Fifth Circuit itself.

D. The Fifth Circuit Has Also Adopted a Narrow Reading of *Tennard* and *Smith* in Other Contexts.

The Fifth Circuit has imposed a narrow interpretation of *Penry*, *Tennard*, and *Smith* on mitigating evidence other than mental health problems and a dysfunctional childhood environment. Unlike the Fifth Circuit's current approach to *Penry* claims based on mental health problems and childhood abuse, abandonment, or neglect, the Fifth Circuit's decisions in this latter class of cases applies a narrow reading of *Penry I* that is symptomatic of the lower court's reluctance to abandon its previous approach to *Penry* claims and indicates continuing refusal to follow this Court's guidance with respect to the scope of *Penry I* and its progeny.

Summers and *Bower*, for example, both dealt with evidence of the petitioners' positive character traits. Summers presented evidence of "his nonviolent nature and general good character" and "his grief for his parents' death."[17] *Summers*, 431 F.3d at 882. Bower presented evidence that "he was a good and decent family man, who up until his arrest, had never been in trouble with the law." *Bower*, 2005 U.S. App. LEXIS 16891, at *16. The Fifth

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[16] "Mitigation" and "sympathy" are not synonymous. See *Johnson*, 509 U.S. at 368, 371-72 (observing that the defendant's evidence of youth was mitigating and moving *and* that the jury should not be permitted to "dispense mercy on the basis of a sympathetic response to the defendant").

[17] Summers also presented evidence of his "ability to conform to prison life." *Summers*, 431 F.3d at 882. However, this evidence appears to be indistinguishable from the petitioner's clean prison disciplinary record in *Franklin*, 487 U.S. at 177-80, in which this Court found that the two pre-1991 special issues were constitutionally adequate.

Circuit rejected both Summers's and Bower's *Penry* claims relying principally on *Coble*, *Boyd* v. *Johnson*, 167 F.3d 907 (5th Cir. 1999), and *Barnard* v. *Collins*, 958 F.2d 634 (5th Cir. 1992). See *Summers*, 431 F.3d at 882-83; *Bower*, 2005 U.S. App. LEXIS 16891, at *16-17. *Summers* also cited *Graham* extensively. *Summers*, 431 F.3d at 883. In both cases, the court concluded that good character evidence simply shows that the defendant's crime was an atypical aberration from his normal behavior that was unlikely to recur and thus could be given adequate consideration under the future dangerousness special issue. See *id.* at 882; *Bower*, 2005 U.S. App. LEXIS 16891, at *17. The Fifth Circuit is apparently under the impression that its conclusion in these cases is consistent with *Graham*. *See Graham* v. *Collins*, 506 U.S. 461, 476-77 (1993). However, this Court has never addressed the application of *Penry I* to good character evidence outside the narrow confines of the retroactivity analysis involved in *Graham*. See *Graham*, 506 U.S. at 472.

Jackson also addressed the limits of *Penry I*. In *Jackson*, the trial court refused to allow Jackson to introduce evidence of the effect his execution would have on his friends and family. *Jackson*, 450 F.3d at 615. Without discussing *Tennard* and over a vigorous dissent by Judge Dennis, the Fifth Circuit upheld Jackson's death sentence. However, testimony from a defendant's friends and family that they value the defendant's life and would mourn his death permits an inference that the defendant had some connection to civilized society. Thus, Jackson's "execution impact" evidence, *ibid.*, was certainly admissible under *Tennard*'s broad view of relevance. See *Tennard*, 542 U.S. at 284 (holding that evidence is relevant at the punishment phase of a capital murder trial if it has "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'" (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 440 (1990))). In addition,

when extensive victim impact evidence is introduced, as it was in *Jackson*, execution impact evidence may be necessary "to avoid 'unfairly weighting the scales in a capital trial'" against the defendant. *Jackson*, 450 F.3d at 621 (Dennis, J., dissenting) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 822 (1991)).

Summers, *Bower*, and *Jackson* demonstrate that the Fifth Circuit continues to struggle with *Penry I* and its progeny and the relationship of that line of cases to *Jurek* v. *Texas*, 428 U.S. 262 (1976) (plurality opinion), and the other cases from this Court that have upheld the constitutionality of the pre-1991 Texas death penalty statute. Although the number of individuals this body of law effects continues to shrink, to the inmates who were sentenced under the pre-1991 Texas death penalty statute, the proper determination of these issues remains of critical interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHRISTOPHER J. RICHART
Mayer, Brown, Rowe & Maw LLP
700 Louisiana St., Ste. 3600
Houston, TX 77002
(713) 238-3000

DAVID R. DOW
Counsel of Record
University of Houston Law Center
100 Law Center
Houston, Texas 77204
713-743-2171 (voice)
713-743-2131 (facsimile)

Counsel for Amici Curiae

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